No. 8115

United States
Circuit Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY,

Appellant,

vs.

CLIFFORD GILBERT,

Appellee.

Brief of Appellant

MURPHY & WHITLOCK,
J. C. GARLINGTON,
R. F. GAINES.
Missoula, Montana,

Filed.....1936.

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STATEMENT OF THE CASE

This is a personal injury case in which defendant appeals from a judgment on a jury verdict in favor of plaintiff. Plaintiff was an employee of defendant railroad but was not engaged in interstate commerce, so that the action is maintained under the State Employers' Liability Act. In all respects material here, the State Act is identical with the Federal Employers' Liability Act.

Appellant's main contention on this appeal is that the trial court should have directed a verdict in favor of defendant. Also specified as error are certain rulings on evidence and instructions to the jury.

The facts are that several days prior to October 30, 1933, plaintiff was employed by defendant to drive a dump truck used in clearing up after a large fire at defendant's shops in Deer Lodge, Montana. The truck was an old, war-time Mack truck, lent gratis to defendant by the City of Deer Lodge for the emergency. It did not run well, and after driving it about three hours on October 30th, plaintiff got out to examine the motor. He saw a pet cock open, next to the whirling, fan, and reached in to adjust it. He contends that by reason of centrifugal force, the fan then exploded and a piece struck his hand, cutting off the fourth finger and injuring the fifth. Defendant contends that plaintiff's version is inherently impossible, and that he simply got his hand into the fan and received his injury. Assuming plaintiff's version of the accident to be true, defendant further contends that the fan's susceptibility to destruction by centrifugal force could not have been discovered

by the exercise of reasonable care on its part, and finally that plaintiff assumed the risk of whatever danger was present.

The foregoing is a birds-eye view of the case as a whole. We will now set out a brief analysis of the pleadings. The first and second counts of plaintiff's complaint, alleging employment in interstate commerce, were dismissed by plaintiff and the court. (Tr. 235). The third and fourth counts are identical, except that they allege employment in intrastate commerce. Defendant does not controvert this.

In the third count plaintiff alleges that he was employed and engaged in driving the truck, and that defendant failed to provide a safe and suitable truck in that it was old, worn, defective, dangerous and unsafe in its then condition, and that defendant negligently failed to repair it or take it out of service. While plaintiff superfluously alleges that the truck was defective in practically every possible respect, the allegations pertinent to the fan assembly are in substance that the axle and bearings were so worn that the fan wobbled, that the cast aluminum fan itself was crystallized, cracked, bent and broken, that in motion the fan would jump around so as to break the fan belt, and that the motor overheated and vibrated. (Tr. 31-32). Finally, plaintiff particularizes very specifically as to how the accident occurred:

> "That while said plaintiff's thumb and fingers were upon said priming cock or pet cock or cup, *the fan upon the engine* of said motor dump truck *became jammed or obstructed and* because of the defective condition herein alleged *suddenly* and violently, and without warning, *exploded, burst, and*

became disintegrated into several pieces, causing said several pieces of the flanges or blades of said fan 3/8 of an inch thick to be thrown and propelled with terrific force and violence through the aperture or opening in front of said fan, which aperture or opening is and was approximately seven or eight inches from the priming cock or cup, on, to, and against the right hand of the said plaintiff, whose right thumb and fingers were then and there touching and adjusting said priming cock or cup or pet cock;" (Italics ours).

In the fourth count, the allegations are the same except that defendant's negligence is alleged to be failure to inspect and examine, and then to repair (Tr. 47). It should be noted specially that defendant is not charged with failure to warn or notify plaintiff, as he knew all about the condition of the truck.

The answer (Tr. 54) is a denial of the negligence alleged, together with a proper plea of negligence on the part of plaintiff, (Tr. 66), of assumption of risk by plaintiff, (Tr. 64), and of the reorganization proceedings in bankruptcy (Tr. 67) in which the defendant became involved June 29, 1935. The latter does not affect the issues of the case on its merits.

The reply (Tr. 71) is simply appropriate admissions and denials of the defendant's affirmative defenses.

With the issues and contentions of the parties thus framed, we may proceed with a more detailed statement of the evidence. Much of the important evidence consists of the broken fan and the entire fan and radiator assembly taken bodily off of the truck. These will be certified as original exhibits for use in consideration of this appeal, and hence a detailed description of them is

unnecessary. Photographs of the truck further clarify the conditions sought to be described.

Plaintiff's astonishing and to us utterly incredible theory requires a very close and minute study of the physical facts shown in the record and by the original exhibits. We say his theory is utterly incredible because we cannot believe, *and the record does not show,* that the physical law of centrifugal force can be bent into a boomerang. That, however, is exactly and precisely what plaintiff does. How he does it will be described in detail later in our brief.

The truck in question is an old, high, war-time Mack of the "bull-dog" type (Tr. 186). Contrary to familiar automobile construction, the radiator and fan assembly separate the motor from the driver's seat, serving as the cowl and dashboard. The radiator consists of circular coils, and the fan rotates inside the circle formed by them. Thus, the coils form a frame encircling the perimeter of the fan. All of this is enclosed in an iron protective frame work, and then mounted in one piece on the truck. The axle or bearing on which the fan rotates protrudes slightly into the driver's compartment in the rear, and into the motor compartment in the front. The axle and the pet cock on the fourth or rear cylinder of the motor are substantially opposite each other and about five to six inches apart (Tr. 96). This is the pet cock plaintiff was attempting to adjust when he was injured (Tr. 118). The fan assembly, except for four supporting crossarms, is entirely open on the front, so that one standing at the motor could see and have open access to the fan as it rotates (Tr. 96). In the event of a slip

or careless movement by one at the motor, there is nothing to keep one's hand from getting directly into the fan.

The fan itself is of cast aluminum alloy (Tr. 196). It has nine vanes, set almost at right angles to the plane of rotation. The vanes are 3/16 of an inch thick, and are bound together on each side at the exterior ends by a continuous band encircling the fan. The material is very brittle (Tr. 196). Since the motor of such a truck cannot exceed 800 or 900 revolutions per minute at top speed, the fan could not revolve at more than 1000 or 1050 revolutions (Tr. 191). The motor idles at 150 to 200 revolutions, and according to plaintiff was running some faster than that when he was injured (Tr. 124). However, the fan probably was not exceeding 500 revolutions at the time. According to the undisputed, uncontradicted testimony, and the *only* testimony on the point, such a metal fan could rotate at more than *12000 revolutions* before breaking from centrifugal force (Tr. 196-7).

At the time of the accident plaintiff was wearing a metal ring on the fourth finger of his right hand, and also had on canvas gloves. As he describes his injury, the flesh was torn away and bone broken on his fourth finger, and the flesh on the little finger was scraped away from the bone for two-thirds its length (Tr. 119-120). Defendant's first-aid man described it as "badly lacerated and looked as though it had been pulled." (Tr. 168). It is to be noted that the wounds were not sharp, clean cuts or lacerations.

After the accident, the fan was found to have four semi-circular pieces broken out of four consecutive vanes

in course of rotation, each at the same point. Then the following vanes are successively more broken. On the right hand cross member of the fan assembly, at a point about opposite the four semi-circular breaks on the fan above referred to, was found a crack or break. Immediately after the accident three witnesses observed light brownish fuzz and a finger mark on the cross member, near the break, the fuzz being the same as on the peculiar gloves worn by plaintiff (Tr. 142; 156; 166).

The foregoing is a brief resume of the principal physical facts produced at the trial. Others will be referred to later, in the course of argument. We will now quote all of the evidence in the record as to how the accident happened. By the plaintiff:

(On direct)

> "That morning about eleven o'clock the truck cylinders started to misfire and the truck began to jerk and heat up and it did not pull as well, so I got out to see what was the matter. I raised the hood and adjusted the carburetor, and in looking over the motor I found the rear priming cup open. The priming cup is used to pour raw gasoline in as an aid to starting the motor. While I was adjusting this the fan, which was six or eight inches from my fingers, broke, cutting off my ring finger. The fan was revolving when it broke and a piece or pieces of the fan struck my fingers." (Tr. 117-118).

(On cross-examination)

> "As to how the accident occurred, I reached for the pet-cock and I was turning it off when something hit my hand and injured it, but as to just what occurred I had not then and do not now have any definite knowledge." (Tr. 129).

(On re-direct)

> "I recall definitely that I did not put my hand into the fan. * * * There is no possibility that I stuck

my hand through those openings and into the fan; and there is nothing in there that I had any purpose in reaching for. * * *

When I was first hurt I knew that the fan had broken, but I did not know just what had happened to it, except that the pieces hit my finger." (Tr. 130-131).

It is at once obvious that this testimony is woefully inadequate to sustain the allegations of plaintiff's complaint. To bolster it he called as an expert one Stubbs, an automobile mechanic of experience. Though he had no experience with trucks or fans of this type, though the fan in question was not described to him, though he never saw or examined it, and though the speed of rotation was not specified, he testified that in the absence of an obstruction a hypothetical fan of some kind would in his opinion have been broken by centrifugal force if it wobbled, hummed loudly, was in an old car and on a worn bearing, and pieces of the fan broke off and flew though the air. Not being connected in any way with the fan in question, this expert evidence, even if it is not otherwise too vague and indefinite, cannot bridge the hiatus in plaintiff's proof.

Accordingly, defendant moved for a directed verdict, specifying the deficiencies in plaintiff's case, but the motion was denied (Tr. 223-225). The jury returned a verdict for $3500.00 in favor of plaintiff.

The individual issues raised on this appeal are stated in our Outline Analysis of Argument immediately following our Specifications of Error.

SPECIFICATIONS OF ERROR

1.

The court erred in overruling defendant's motion for a directed verdict made at the conclusion of the testimony.

2.

The court erred in holding that there was any evidence sufficient to go to the jury of negligence upon the part of the defendant in the particulars alleged in the plaintiff's complaint, or at all.

3.

The court erred in holding that there was any evidence sufficient to go to the jury tending to show that any negligence on the part of the defendant was the proximate cause of the plaintiff's injury.

4.

The court erred in holding that there was any evidence sufficient to justify a verdict or support a judgment in favor of the plaintiff and against the defendant.

5.

The court erred in holding that the evidence was sufficient to establish any violation of duty owing from the defendant to the plaintiff.

6.

The court erred in holding that the evidence was sufficient to establish notice to or knowledge of the defendant of the defective condition of the particular instrumentality which is alleged in the plaintiff's complaint to have given away or failed and caused the injury to the plaintiff, and that by the exercise of ordinary care the defendant could have discovered the same.

7.

The court erred in holding that the evidence was insufficient to establish that the injury suffered by the plaintiff, if it occurred in any manner alleged in the complaint, was brought about by conditions well known to and appreciated by the plaintiff, and that the plaintiff and his guardian ad litem had full knowledge of the condition and particularly of the defects, if any, of the truck described in the complaint, the danger and risk from all of which was assumed by the plaintiff and his guardian ad litem.

9.

The court erred in overruling defendant's objection to the introduction of any evidence in the case upon the ground that the complaint does not allege facts sufficient to constitute a cause of action.

14.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

> "(5) You are instructed that the law presumes that the truck furnished by the defendant to the plaintiff was not defective, and that if the truck were actually defective the law further presumes that the defendant had no knowledge of the defect and was not negligently ignorant thereof. This presumption has the force and effect of evidence on the defendant's behalf."

15.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance

in accordance with the following instruction which the defendant requested the court to give to the jury:

> "(6) You are instructed that even though you may find from the evidence that the defendant knew or in the exercise of ordinary care should have known of various defects in the truck, such as its failure to start, its tendency to overheat, the tendency of the motor to miss, etc., yet unless you find from a preponderance of the evidence that the defendant knew or in the exercise of ordinary care under the circumstances should have known that the fan upon said truck was so defective that it could reasonably be anticipated that it would explode and cause injury to the driver of said truck, your verdict should be for the defendant."

18.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

> "(9) The plaintiff was hired by the defendant to serve as a driver of the truck. If you find that the plaintiff's acts in attempting to repair or correct the alleged defective condition or operation of the truck were not a part of his duties and were outside the scope of his employment as a driver, even though they were intended for the defendant's benefit, the defendant is not liable for the injuries received by the plaintiff as a result thereof, and your verdict should be for the defendant."

23.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

> "(15) You are instructed that you shall disre-

gard any testimony which you find to be in conflict with physical facts or the law of nature."

24.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(16) You are instructed that there is no evidence of loss of earning capacity by the plaintiff, and that therefore you may award him no damages for loss of earning capacity as a result of his injury."

25.

The court erred in his instruction to the jury with reference to whether the injury was proximately caused by some act or ommission of the defendant, the particular portion of the charge being as follows:

"Now the test to be applied in determining whether the injury was proximately caused by some act on the part of the defendant or some omission on its part is, whether the injury was a reasonably foreseeable event, as the natural and probable consequence of the act or omission, if any, of the defendant or its agent. Now, this does not mean that one reasonably might have foreseen that that truck would stall, or that the plaintiff in this case would be required to leave the position where he sat in driving the truck and get on the ground and open the hood to try to make some adjustment of the pet-cocks or the motor, or that the fan was going to blow up, if it did blow up, or become jammed and break, if it did become jammed and broke, and that the plaintiff's finger would be cut off. It merely means that the conditions were such that it might be reasonably foreseen that some injury might result to someone if that someone made an effort to use the machine in its then condition. If it were otherwise, a defendant

would have a perfect defense in every action preferred against it, because if it were a rail broken or misplaced on the line of a railroad they would say that it was only one rail that was out of line and misplaced or broken, and we could not foresee that that particular rail was going to get broken or that this particular train or person was going to pass over that rail. It comes down to the single thought that an injury may be said to be within the rule of this clause, as I have stated it to you, if it is reasonable to suppose that conditions may arise which will bring about an injury to some person or thing."

Exception was taken to the charge as follows:

"The defendant excepts to the charge and instruction of the Court given in connection with the defendant's instructions three and four, wherein the Court said in substance that it was not necessary that the acts resulting in the injury be foreseen exactly as they happened, but the Court did instruct that the conditions must be such that some injury might result to someone if an effort were made to use the truck. Our objection to that is upon the ground that it requires the defendant to foresee any injury from any cause whatever, whereas, under the allegations of the complaint, the defect was only in the fan and the duty would be to foresee some injury from a defect or failure in the fan."

The COURT: The exception is overruled. You may have an exception."

26.

The court erred in his instruction to the jury with reference to the inclusion of loss or earning capacity in the measure of damage for plaintiff's injury, the particular portion of the charge being as follows:

"If your verdict is for Gilbert, you should allow for all pain and suffering, if any, caused by the injury, whether such pain has now past, is present, or will, with reasonable probability exist in the future, and you should allow for any loss of capacity to earn

money caused by the injuries, whether past, present, or with reasonable probability will exist in the future. In this connection you may consider his expectancy of life, not as controlling your judgment, but as somewhat enlightening your considerations. If the injury has caused a definite amount of loss of earning capacity, simply multiplying such loss by the years of expectancy is not as accurate a method of valuing the loss as determining what amount would be required to buy an annuity for life, equal to the loss, with some responsible life insurance company. * * * You are charged, gentlemen of the jury, that an ordinary man of twenty years of age in the north temperature zone of America, according to the American mortality tables, has an expectancy that he will live more than forty years."

Exception was taken to the charge as follows:

"The defendant further excepts to the Court's charge and instruction to the jury wherein the Court directs the jury, among other things, to consider the expectancy of life of the plaintiff and his earning capacity and the probable cost of the purchase of an annuity, on the ground that there is no evidence in the record of the earning capacity of the defendant, and that such items would not properly be considered by the jury in determining the damage, if any, suffered by the plaintiff.

The COURT: Let the record show that the instruction with reference to the expectancy of life was given pursuant to an agreement between Mr. Maury, of counsel for the plaintiff, and Mr. Murphy, of counsel for the defendant, as the statement of a correct legal principle.

Mr. MURPHY: Yes; but objected to simply as not applicable here. The legal principle is correct.

The COURT: Very well. The objection is overruled and an exception granted.

* * * * * * *

Mr. MURPHY: I think there is one exception that we desire that may have been included in the one to which we already have an exception, and

that is the action of the Court in submitting to the jury the question of the loss of earning capacity on the part of this plaintiff, for the reason that there is no proof of his earning power prior to, at the time of, or after the accident.

The COURT: Yes; the testimony shows, Mr. Murphy, that he had worked prior to the accident and earned six or seven dollars a day, and that at the time of the accident he was working at a wage, I think, of $5.25 or $5.50 a day; that he had prepared himself to go into a garage there at a wage of six or seven dollars a day. And it seems to me obvious where a man has lost the third finger of his right hand and has practically lost the little finger (it is a cumberance rather than a help) that the jury may consider the reduction in his earning capacity. They do not hire one-armed mechanics.

Mr. MURPHY: We except to the statement of the Court as to the earning capacity of the plaintiff.

The COURT: This is simply my opinion. I have no desire to control your decision as to any fact. I am merely stating to you the testimony as I recall it and you can determine what the facts really are. The facts are for you, and the law is for me."

OUTLINE ANALYSIS OF ARGUMENT

I. The judgment should be reversed, and the action dismissed on its merits, for the following reasons:

   A. Plaintiff's theory of the causation of the injury is not supported by the evidence in three particulars:

      1. The evidence leaves the manner and cause of the happening of the injury purely within the realm of speculation and conjecture.
      2. His theory can only be established by erecting an edifice of three inferences, built one upon the other as forbidden by law.

3. His theory of explosion of the fan by centrifugal force, with ensuing injury to his hand while opposite the center of rotation, is contrary to all the established physical facts and laws in the case.

B. Assuming plaintiff's theory of explosion by centrifugal force to be true, still there is no evidence that by reasonable inspection defendant could have discovered and guarded against this latent and hidden defect.

C. Assuming both the truth of plaintiff's theory and negligence on the part of defendant, still plaintiff was a skilled mechanic and truck driver whose knowledge of the condition of the truck was superior to defendant's, and therefore when plaintiff used it without notice or complaint to defendant he assumed the risk of the danger complained of.

II. The judgment should be reversed in any event, for a new trial, because of the following errors committed at the trial:

A. The court broadened defendant's duty to foresee danger of injury far beyond plaintiff's pleadings, theory and evidence.

B. The court permitted the jury to allow damages for loss of earning capacity, when there was no evidence of loss thereof, and also commented to the jury upon the facts not in evidence.

C. The court refused to submit to the jury defendant's defense that plaintiff went outside the scope of his employment in repairing the truck he was hired merely to drive.

D. The court refused to charge the jury to disregard evidence contrary to physical facts and laws, and that the presumption of law is that there was no negligence on the part of defendant in furnishing the truck to plaintiff.

ARGUMENT

SECTION ONE.

THE CASE SHOULD BE REVERSED AND DISMISSED

I. PLAINTIFF'S THEORY OF CAUSATION IS NOT PROVED. As we have pointed out, plaintiff's theory is that centrifugal force caused the fan to explode and throw a piece of the metal against his hand. We believe that plaintiff carelessly or otherwise got his fingers involved in the whirling fan. That is not our only defense, or the only point we urge on this appeal, but *we are morally convinced that it is the truth as it actually happened.* We believe the physical facts confirm our view to such an extent that the court should have directed a verdict for defendant.

Furthermore, we take it to be self-evident that defendant could not be held liable in this action if plaintiff put his fingers in the fan.

N. Y. Central R. R. v. Ambrose, 280 U. S. 486, 74 L. Ed. 562.

But we can go even a step further. We do not have to assume the burden of establishing affirmatively that the accident occurred as we say it did. It is ample if we demonstrate that plaintiff has not proved by a preponderance of the evidence that it occurred as he alleges it did. The Supreme Court of the United States has clearly laid down the rules that govern cases of this kind, and before

proceeding to analyze the evidence in detail we will refer briefly to some controlling decisions.

In,

Northwestern Pacific R. R. vs. Bobo, 290 U. S. 499, 78 L. Ed. 462,

the court held:

"Our decisions clearly show that "proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer."

In,

Gunning vs. Cooley, 281 U. S. 90, 74 L. Ed. 720,

the court held:

"A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule "that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

In,

Kern vs. Payne, 65 Mont. 325, 211 Pac. 767,

certiorari denied 261 U. S. 617, 67 L. Ed. 829, the court held:

"To sustain plaintiff's position, therefore, it must be inferred that the coupler on the moving car was closed, and then upon that inference it must be inferred that he went in between the cars to open the closed coupler, both of which inferences must be pre-

ceded by the presumption that he knew the coupler on the standing car was defective and would not operate. One presumption cannot be based upon another presumption. (16 Cyc. 1050; Looney v. Railway Co., 200 U. S. 480, 50 L. Ed. 564-569, 26 Sup. Ct. Rep. 303 (see, also, Rose's U. S. Notes). The inference cannot be drawn from a presumption, but must be founded upon some fact legally established. (5 A. L. R. 1340.)"

In,

Fisher vs. Butte Elec. Ry. Co., 72 Mont. 594; 235 Pac. 330,

the court held:

"To sustain a recovery the evidence relied upon, whether direct or indirect, must be substantial—more than a mere scintilla. (Escallier v. Great Northern Ry. Co., 46 Mont. 238, Ann. Cas. 1914B, 468, 127 Pac. 458; McIntyre v. Northern Pac. Ry. Co., 58 Mont. 256, 191 Pac. 1065.) A verdict connot rest upon conjecture, however shrewd, nor upon suspicion, however well grounded."

And in,

United States vs. Hansen (CCA 9) 70 Fed. (2d) 231,

the court held:

"Neither court nor jury may credit testimony positively contradicted by physical facts."

Let us now examine the evidence. We have already quoted in full plaintiff's testimony as to how the accident happened. His statement that his hand was on the pet cock when it was struck by a flying piece of the broken fan has absolutely no corroboration whatsoever. *On that one bare statement hangs his whole case.* If it were also unimpeached, his case would be stronger. Unfortunately for him, however, it is badly impeached, entirely aside from the controlling physical facts. First, it is im-

peached by his confession, on the witness stand under fair cross-questioning, that he did not at the time of accident or time of trial have any definite knowledge as to what happened (Tr. 129). Second, it is impeached by the witness Jones, who testified that while taking plaintiff to the doctor plaintiff said that "somehow he got mixed up with the fan," and that "he did not know just how the accident happened." (Tr. 155). Third, it is impeached by the witness Sears, who saw plaintiff the next day, and testified that upon his inquiry plaintiff didn't seem to know just how it happened (Tr. 139). Fourth, plaintiff's credibility is impeached generally by his statement that he got Exhibit 1, a piece of the fan, from the truck thirty days later (Tr. 118), contradicting his father who testified that he personally got it an hour and a half after the accident (Tr. 133), and also that he was present when the truck was first delivered to the defendant (Tr. 122), contradicting his father, who said plaintiff was at home (Tr. 95-96).

From the foundation of a wobbling fan, breaking fan belt, heating and missing motor, humming and grinding fan, together with plaintiff's impeached statement, counsel sought to complete the case by expert evidence from the witness Stubbs. We have already pointed out that Stubbs was an automobile mechanic, experienced only with steel automobile fans which are totally different from the fan in question. Furthermore, he was not shown the broken fan, nor was its general nature even described to him by counsel. Under these handicaps, he was asked hypothetically what would cause a fan to break, and he answered that it would be centrifugal

force (Tr. 114). We think it perfectly obvious that his answer is of no value because of the lacking essential elements of the peculiar type of fan in question. What a steel fan might do in a high speed automobile motor is no proof whatever of what an aluminum fan like this might do. However, the conclusive deficiency in Stubbs' testimony is that counsel gave him *no rotation speed on which to base his answer.* Centrifugal force increases as the square of the rotating speed (Tr. 211). Without rotation, there is no centrifugal force. Therefore, if the speed of the fan's rotation in counsel's question was low enough, Stubb's answer was wrong; conversely if the speed was high enough, Stubbs' answer was right. What was the speed? How could Stubbs tell? How could the jury tell? How can the court tell?

The answer is plain—no one can tell, and his testimony is utterly valueless. With this link missing, plaintiff's case wallows deep in speculation and conjecture. There is no proof whatever that the fan "suddenly * * * exploded, burst, and became disintegrated into several pieces," as alleged in the complaint (Tr. 49). Much more is this true in the light of the uncontradicted testimony of the witnesses O'Neill and Doctor Shue, who after examination of the *fan in question* and with full knowledge of all the facts, stated that centrifugal force did not cause the accident. (Tr. 185-193; 193-212).

Thus far we have considered plaintiff's own evidence, on its own intrinsic merit, and have found it deficient. Now let us see how it is refuted by the immutable physical facts and laws present in this case. If the court will examine the photographs certified as original ex-

hibits, it will be seen that the pet cock plaintiff was adjusting is about five or six inches distant from, and directly opposite, the axle or bearing of the fan. It is a physical law that centrifugal force is directed outward from the center of rotation, and broken pieces of the fan would necessarily fly outward in the plane of rotation. However, in a way entirely unexplained by the evidence, plaintiff contends that the flying piece which struck him traveled *almost directly opposite to centrifugal force.* Thus we say they have tried to bend the law of centrifugal force into a boomerang. The court knows judicially that such a thing cannot be done. It is inherently impossible and incredible that centrifugal force broke that fan and threw a piece in reverse with such force as to cut off plaintiff's gloved finger.

Therefore, we most earnestly submit that plaintiff's impeached and uncorroborated statement, unsupported even by his own expert opinion testimony, must certainly be held as a matter of law to be entirely superseded by the plain laws of nature operating directly to the contrary. It is the legal duty of the court to disregard such a statement, and dispose of the case as though it had never been made. This compels a reversal and dismissal of plaintiff's action.

Not only do the physical facts and laws make plaintiff's theory inherently impossible, but they very closely confirm our belief that plaintiff actually got his fingers into the fan. For example, the form of the breaks on the fan clearly indicate that they were caused by an obstruction. Dr. Shue gives a complete explanation of this point in his testimony at page 197 and 198 of the transcript.

To understand it clearly it is almost necessary to refer to the broken fan itself. A man's finger, wearing a metal ring and being encased in a canvas glove, could form such an obstruction and cause such breaks. (Tr. 208-209).

Furthermore, if centrifugal force operates as plaintiff claims it does, scattering pieces in every direction, there should have been pieces of fan scattered all around the truck. Yet, plaintiff's father and the witness Truscott, visiting the scene very shortly after the accident, saw no pieces in the fan housing itself, and on the splash pan underneath. (Tr. 133-135).

Again, the very top speed of the motor and fan was so far below the minimum at which such a fan could break by centrifugal force that such a thing is out of the question. Top speed of the fan was not over 1050 r. p. m. (Tr. 191), while at idling speed it would be about 250 r. p. m. (Tr. 187). Plaintiff says the motor was more than idling when he was adjusting the pet cock (Tr. 124), but the foot and hand throttles were closed. (Tr. 123-124). As compared to these speeds the minimum speed at which centrifugal force could break the fan is 12,000 r. p. m. (Tr. 197), about twenty-five times faster than the fan was running. These calculations are a matter of physics (Tr. 196). They were not assailed by plaintiff and must be accepted as true. They clearly demonstrate the inherent impossibility of plaintiff's case.

In addition, the very foundation of plaintiff's claim of breakage by centrifugal force is refuted. It is only an inference, at best, that the fan broke from centrifugal force, and this inference is based on the testimony that

the fan wobbled, hummed and broke the fan belt. Through defendant's witnesses Sears, Jones, Hulben and Dennis, its machinists at the Deer Lodge shops, it was proved without contradiction that the fan assembly, now before this court as original Exhibit 2, is in exactly the same condition as it was before the accident, except that a new fan is in place. Machinist Hulben took out the broken fan, and installed a new fan on the same axle, bearing, ball bearings, and sleeve or race on which the old fan rotated (Tr. 179-182). He testified:

> "So, inasmuch as there has been no change in the bearings, the end-play in the new fan is exactly the same as it was in the old fan, and any wobble that might be present in the new fan is exactly the same as it was in the old fan. * * * The conditions in reference to end-play and wobbling now present in the new fan are identical with the conditions present in the old fan at the time I was assigned to take the old fan out and before it was removed."

The court must take this evidence at full face value, since it is unimpeached and uncontradicted in any particular, even though the witnesses are defendant's employees. This is the rule of the Supreme Court.

In,

> Chesapeake & Ohio R. R. v. Martin, 283 U. S. 209, 75 L. Ed. 983,

the court said:

> "And, in consideration of the question (motion for directed verdict) the court, as will be shown is not at liberty to disregard the testimony of a witness on the ground that he is an employee of the defendant, in the absence of conflicting proof or of circumstances justifying countervailing inferences or suggesting doubt as to the truth of his statement, unless the evidence be of such a nature as fairly to be open

to challenge as suspicious or inherently improbable."

This rule was applied to a master and servant personal injury case in,

Pennsylvania R. R. v. Chamberlain, 288 U. S. 333, 77 Law Ed. 819.

Therefore the court can by personal examination and rotation of the fan in Exhibit 2, determine for itself whether there is any wobble or excessive end-play. It shows no wobble whatever, and rotates freely and truly on its bearing. If it did not, plaintiff and his father, both mechanics, had every opportunnty to examine it in court and testify to a contrary opinion if they had such. Thus, the very basis and foundation upon which plaintiff's case is sought to be erected falls away before the physical facts silently disclosed by Exhibit 2.

Finally, the natural probability of our belief is borne out by related location of the operating parts of the truck. The pet cock was but a few inches from the open, whirling fan. The right cross-arm, on which the fuzz and marks from plaintiff's glove were observed, and which was cracked at a point opposite the semi-circular breaks in the fan, was just on a level with the pet cock and plaintiff's hand. Further, it was separated from the vanes of the fan from 1-3/16 inches near the axle down to 5/8ths of an inch at the point of the break (Tr. 206; 212). Thus it could not serve as a shears to sever a man's finger when caught in the whirling fan (Tr. 206). Rather it would tend to lacerate and pull the flesh away, just as described by plaintiff and witness Zurmuehlen (Tr. 119-120; 168). It would be very easy for a gloved *right* hand

to slip from the handle of the pet cock in a right handed direction a few inches so as to become involved in the fan, and then become lodged between the fan and the right cross-arm. In such position, fortified by a ring and a glove, and held stationery by the cross-arm, the fingers would naturally cause nicks in the vanes in rotation just as they now appear. Therefore we contend that these physical facts and circumstances are all so consistent with our belief, and so inescapably opposed to plaintiff's theory that the court cannot avoid the conclusion that plaintiff was injured by getting his hand into the fan. This conclusion, or the lesser conclusion that the manner of happening of the accident is left to speculation and conjecture, compel a reversal and dismissal of plaintiff's action.

So far in our argument on the sufficiency of plaintiff's evidence and the error of the trial court in denying defendant's motion for a directed verdict, we have confined ourselves strictly to the facts. Now it is appropriate to refer to cases and authorities which support our contention. These will be divided into three groups,—first, to the effect that plaintiff's case rests on speculation and conjecture; second, that it is based upon inferences drawn from other inferences; and third, that it is contrary to controlling physical facts.

(1) The general rule that a case of negligence which rests on speculation and conjecture is insufficient will not be questioned by opposing counsel. Its applicability to this case doubtless will be questioned, however. We realize that this and every case must be determined upon its own peculiar facts, and accordingly that other cases

can rarely be conclusive but rather illustrative and persuasive.

In,

C. M. St. P. Ry. Co. vs. Coogan, 271 U. S. 472, 70 L. Ed. 1041,

a brakeman had been killed by a train which was being made up. There was no eye witness of the accident and the plaintiff's theory was that deceased caught his left foot in a bent air pipe line just outside the rail and in that manner was tripped so that he fell over the rail and was run over. To prove this theory plaintiff relied upon scratches on deceased's left shoe and a rounding depression parallel with the sole and just above the heel. It was also shown that he had been dragged about 15 feet and that it was his duty to go between the cars to couple the air hose. The court reversed a judgment for plaintiff, holding (1st) that when substantial evidence is relied upon to prove a fact the circumstances must be proved and not themselves presumed; (2nd) that the case was built up by inference drawn from inference, and that the marks on the shoe were insufficient to bridge the hiatus in plaintiff's case; and (3rd) that the record left the manner of the accident in the realm of speculation and conjecture.

In,

N. Y. Central R. R. vs. Ambrose, 280 U. S. 486, 74 L. Ed. 562,

the deceased was employed in a grain elevator having large bins with rectangular manhole covers at the top. One of the bins had been filled with poisonous gas to destroy vermin, which decedent knew. He was found dead in the bin with the manhole cover removed and the

electric light in the bin burning. The plaintiff's theory was that a signal had been given for decedent to go into the bin to prepare the spouts, or that while he was sweeping the floor above the bin it was necessary for him to remove the cover, and that in so doing he was overcome by the gas and fell into the bin. The court reversed a judgment for the plaintiff, holding that the verdict rested only upon speculation and conjecture, and that a showing merely that the employer may have been guilty of negligence is insufficient because the evidence must point to the fact that he was actually negligent.

In,

A. T. & S. F. Ry. Co. vs. Toops, 281 U. S. 351, 74 L. Ed. 896,

decedent was a conductor, superintending the switching of a number or cars. There were no eye witnesses, and he was found lying on the track between the rails. Approximately 14 cars in one string had passed over him, and while there were no marks of flesh or blood on the first car, there were such marks upon the south wheels of each of the following cars. The plaintiff's theory was that the roadbed was too thinly ballasted and that there was negligence in making the switch movement without signal, flagmen or lights. The court reversed a judgment for the plaintiff, holding that the jury may not be permitted to speculate whether negligence of the employer was the cause of the injury. The case is particularly interesting because the court placed much reliance upon the physical fact that there were no marks of blood or flesh upon the leading car, which the court considered to render highly improbable plaintiff's theory that de-

ceased was run down by the cars while crossing or standing upon the track. So in the instant case the infallible operation of centrifugal force renders highly improbable plaintiff's theory of his own accident.

In,

A. T. & S. F. Ry. vs. Saxon, 284 U. S. 458, 76 L. Ed. 397,

deceased was a brakeman who was run over by his train. There were no eye witnesses, but plaintiff's theory was that deceased was running along by the side of the track and stepped upon a soft area or hole in his pathway and was caused to fall and be run over. To prove this it was shown that across the pathway commonly used there was a slight depression filled with small rock screenings which was softer than the other portions of the path and yielded to the foot. Just west of this place blood was found upon the rail. A footprint was found in the pathway heavier than most and looking as though someone running had stepped in it. The court reversed a judgment for the plaintiff, holding that there was nothing but conjecture to support the plaintiff's theory and there was no casual negligence on the part of the defendant shown by the evidence.

In,

Pennsylvania R. R. vs. Chamberlain, 288 U. S. 233, 77 L. Ed. 819,

deceased was a brakeman riding a string of cars being switched. Plaintiff's theory was that the cars he was riding were negligently caused to be brought into violent contact with other cars so that he was thrown to the track and run over. Many witnesses testified that there was no such collision, but plaintiff's witness testified that

from a considerable distance away he heard a loud crash, and upon turning saw the two strings of cars together and the deceased no longer visible. He later went to the spot and saw the deceased between the rails. The lower court directed a verdict for defendant, which was reversed by the Circuit Court of Appeals. The Supreme Court reversed the Circuit Court, holding that from the witness' position his testimony that he saw the two strings of cars moving together, was incredible as against the positive testimony of other witnesses to the contrary. The court further held, leaving out this testimony a judgment for plaintiff would rest upon speculation and conjecture.

In,

Northwestern Pac. R. R. vs. Bobo, 290 U. S. 499; 78 L. Ed. 462,

the deceased was a bridge tender, working the night shift. He disappeared, and was found in the water two weeks later. At the time of his disappearance he wore a coat with a sheep-skin collar, and shortly after his disappearance witnesses observed small pieces of wool and blood spots near the edge of the iron platform at the foot of the stairway on the bridge. The steps and platform were smooth and became quite slippery when dew accumulated on them. Plaintiff's theory was that by reason of the negligently slippery steps deceased slipped and fell into the water. The court reversed a judgment for the plaintiff, holding that the plaintiff's case rested upon pure speculation and that there was nothing from which a casual connection of negligence on the part of the defendant might be drawn.

We believe the foregoing cases are valuable for their illustration of the standards to which a plaintiff's case of negligence must conform. Outside of plaintiff's one incredible statement, which the Supreme Court would not hesitate to disregard, the plaintiff's case here depends upon even vaguer inference and speculation than any of the cases cited.

(2) Counsel also will doubtless concede the general rule that a case of negligence may not be made out by building one inference upon another, and then dispute its applicability here. Let us look at the facts again.

There is no direct evidence of explosion by centrifugal force. That is left to be inferred from the wobbling, grinding fan and the flying piece of the fan to which plaintiff testified. Having inferred centrifugal force, is a case made out? No, because normally centrifugal force cannot reverse itself and propel things backward. How, then, did the flying piece come to strike plaintiff's hand? The record furnishes no answer, unless it be a further inference that we have here a very phenomenal type of centrifugal force, or that the piece bounced back on to plaintiff's hand, or that some counter-explosive force intervened to reverse the normal operation of centrifugal force. Is even this enough? No, because it must further be inferred that defendant knew or by ordinary care should have known of the danger of such weird occurrences coming to pass. Therefore, to make out his case plaintiff must spin out three inferences, each based solely and squarely on the next preceding one, and the first based upon what we have already shown to be a physical impossibility under the circumstances. If there

ever is a limit beyond which a plaintiff may not go in personal injury cases, this case surely exceeds that limit.

Comparable cases demonstrate this further. The case closest home is,—

Kern vs. Payne, 65 Mont. 325, 211 Pac. 767. Certiorari denied 261 U. S. 617, 67 L. Ed. 829,

where action was brought for the death of a brakeman on the theory that a coupler on a car was defective, requiring deceased to go between the cars where his foot was caught in a switch frog, and he was thrown upon the track. The court reversed a judgment for plaintiff in the following language:

> "To sustain plaintiff's position, therefore, it must be inferred that the coupler on the moving car was closed, and then upon that inference it must be inferred that he went in between the cars to open the closed coupler, both of which inferences must be preceded by the presumption that he knew the coupler on the standing car was defective and would not operate. One presumption cannot be based upon another presumption. (16 Cyc. 1050; Looney v. Railway Co., 200 U. S. 480, 50 L. Ed. 564-569, 26 Sup. Ct. Rep. 303 (See, also, Rose's U. S. Notes). The inference cannot be drawn from a presumption, but must be founded upon some fact legally established. (5 A. L. R. 1340).

In,

Doran vs. U. S. Bldg. & Loan Association, 94 Mont. 73; 20 Pac. (2d) 835,

plaintiff tripped over a projecting metal nosing on a stair step. The court reversed a judgment for plaintiff, and said:

> "Furthermore, in order for the jury to find the defendant negligent, it would have been necessary for them to have first presumed that the condition testified to continued for a sufficient length of time

to charge the defendant with notice and, having indulged that presumption, inferred therefrom that defendant had notice of this alleged dangerous condition.

From one fact found another may be presumed if the presumption is a logical result; but to hold that a fact presumed at once becomes an established fact for the purpose of serving as a basis for a further presumption or inference would be to spin out the chain of presumptions into the barest region of conjecture. (First National Bank of Glendive v. Sorenson, 65 Mont. 1, 210 Pac. 900; Kern v. Payne, 65 Mont. 325, 211 Pac. 767).

In,

Glasgow Maru (D. C.) 1 Fed. (2d) 503,

contention was made that a ship collided with another ship because of a shoal at the wharf. Proof of the shoal depended upon circumstances from which the existence of the shoal might be inferred. There was no direct evidence as to what caused the collision. The court held that the case was insufficient, saying that without direct evidence that there was a shoal the court was asked to infer its existence from circumstantial evidence, and upon that inference to rest still another inference that the shoaling caused the sheer.

In,

Tucker vs. Traylor Engineering & Mfg. Co. (CCA 10); 48 Fed. (2d) 783,

the buyer of a rock crusher brought action against the seller for damages for fraud, claiming that a defect in the machine had been wilfully concealed by painting over it. The court affirmed a judgment for the defendant, saying in substance that the plaintiff relied upon meager circumstances to arrive at the inference that there was a

defect when the machine was shipped, and that it was not permissible to build upon that inference the further inference that the defendant knew of the defect.

In,

Cardinale vs. Kemp (Mo.) 274 S. W. 437,

plaintiff sued a physician for alleged malpractice. The court affirmed a judgment of nonsuit, saying:

> "The law is well settled that the appellant cannot make out his case by building one inference upon another. In order for him to prevail on the theory of his counsel it would have to be inferred that the scar found upon the eye ball was caused by a cut, and the further inference that the respondent caused the cut; and still further, that the cut caused the loss of the eye. This cannot be done."

A case very closely in point is,

Riggie vs. Grand Trunk R. R. (Vt.) 107 Atl. 126,

Writ of Error Dismissed 254 U. S. 658, 65 L. Ed. 461.

There plaintiff contended that a jack was not reasonably safe because there was sand or gravel between the cogs or teeth thereof. The court held that evidence that the jack had occasionally been thrown into gravel and that gravel sometimes got between the cogs, was insufficient to establish the alleged defect, because this would be basing presumption upon presumption.

(3) We have already discussed the importance and consequence of the physical facts and laws involved in this case. Turning now to the legal side of the question, we can find no authority, except a line of emery wheel cases later to be cited under another point, which is directly in point on its facts. However, the following cases are at least analogous and illustrate how stronger cases

than plaintiff's have been dismissed as at variance with physical facts and laws.

In,

American Car & Fdry. Co. vs. Kinderman, 216 Fed. 499,

plaintiff was an employee working under a car which was run into by an engine. The negligence charged was permitting the engine to be defective and unsafe in that the spring on the throttle was defective so that it could not be stopped quickly. The engineer testified that the spring had become weak and lost its temper and that he had reported it several times. Defendant denied this, and produced evidence showing that the spring had never been changed since the accident, that it worked perfectly immediately afterward when tested, and that it was still in perfect condition at the time of trial. Defendant also showed by experts that such springs usually lasted the life time of the engine and that an additional spring could not be obtained anywhere except from the locomotive manufacturer. The court reversed a judgment for plaintiff and held that the testimony of the engineer was positively contradicted by the physical facts, and a verdict should have been directed for defendant.

In,

Nugent vs. Kauffman Mill (Mo.) 33 S. W. 428,

plaintiff testified that a nail or some other heavy substance fell through a spouting which at the time and just above plaintiff was choked with wheat chaff and mill grindings with such velocity and force and in such a manner as to strike a scoop held in the right hand in such a way as to cause the left hand working above and in-

dependent of the scoop to be knocked downward between crushing rollers. The court held that this testimony so contravened all generally recognized laws of mechanics and philosophy as to require it to be ignored.

In,

Sexton vs. Metropitan Street Ry., (Mo.) 149 S. W. 21,

plaintiff was an electrician in defendant's power house working at a converter where he was burned by an electric "flash-over." His theory was that tar leaked from the roof on to the machine and caused the condition. Impeached testimony of one witness showed that there was tar on plaintiff after the accident but other evidence showed no tar on the machine, and also that tar was a non-conductor of electricity and would have to be destroyed by being reduced to flame before it could serve as a conductor. The court reversed a judgment for plaintiff, holding that the physical and scientific facts were opposed to the theory that the flash-over was caused by the tar.

In,

Larsen vs. N. P. Ry. (Minn.) 241 N. W. 312,

plaintiff fireman was injured when the spindle of a water gauge on the locomotive blew out and struck him on the head. The evidence showed that the spindle was in the same condition at the trial as at the time of accident, and that the threads remaining on the spindle would resist many times the pressure in the boiler although the innermost threads were worn. The court affirmed a verdict directed for defendant, saying:

> "No amount of expert opinion could convince reasonable minds against the visible condition of the

spindle. We therefore conclude that the visible condition and nut are such as to conclusively contradict the opinions of the plaintiff's experts and to demonstrate that the spindle did not blow out. In our opinion reasonable minds functioning judicially could not differ as to that conclusion."

In,

Samulski vs. Menasha Paper Co. (Wisc.) 133 N. W. 142,

plaintiff was injured operating a machine for barking wood. He placed his hand between the casing and the disc for the purpose of changing the knives of the machine, and claimed that while thus engaged, and while the disc was at rest, the drive belt was shifted from the loose to a tight pulley, causing the disc to revolve and injure him. The physical facts show that the drive belt had not and could not have been shifted as claimed, and that the only rational explanation of plaintiff's injury was that he had placed his hand and arm between the casing and the disc before the disc had entirely ceased to revolve by its own momentum after the plaintiff had shifted the drive belt from the tight to the loose pulley. The court reversed a judgment for plaintiff, and said that the testimony of the witness, or finding of a jury contrary to unquestionable physical situations, or common knowledge, or conceded facts, was of no weight in favor of the side it was invoked to support, while it might be successfully impeached by its demonstrated utter improbability or impossibility.

We do not see how a case could be more closely in point on every important feature than the case last above cited.

II. PLAINTIFF FAILED TO PROVE NEGLIGENCE IN ANY EVENT. Up to this point we have attacked plaintiff's case on its own inherent incredibility and insufficiency. Now we propose to attack it on its failure to prove negligence of the defendant if we *assume* that the accident occurred from centrifugal force. We contend that plaintiff has failed to prove that by the exercise of reasonable care defendant could have discovered the latent danger of explosion of the fan through centrifugal force.

The Supreme Court of the United States has defined the duty owed by a master to his servant as follows:

> "The employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end."

The Supreme Court of Montana has laid down the same rule:

> " * * * the master is chargeable with the duty only of using reasonable care to provide plaintiff with a reasonably safe and secure vehicle."
>
> Demarais vs. Johnson, 90 Mont. 366, 3 P. (2d) 283.

The court also instructed the jury to this effect (Tr. 267).

Accepting this as the criterion of defendant's duty, does the evidence show any breach of it? Absolutely without contradiction, the following facts appear. As soon as the truck was first received from the City, defendant placed Albert Schurman in charge of it as driver. Schurman is an automobile mechanic and truck driver of ten years experience. His intelligence and ability were not discredited in any way. He testified that he examined the truck carefully when he first began to drive

it, the fan assembly particularly because the motor heated up. He found the fan assembly in good order, no wobble and slight end-play. (Tr. 169-171). Some end-play is necessary to allow free rotation and prevent overheating (Tr. 180). His inspection was as complete as could be made without taking the motor down. Therefore, it appears without dispute that defendant procured a reasonable inspection of the truck to be made by a reasonably competent mechanic, and that no defect or danger of explosion from centrifugal force was observed. Since defendant necessarily must act through employees, this was an adequate and reasonable compliance with its legal duty.

Next, when Schurman left, defendant asked the Mayor of Deer Lodge for an experienced man to drive the truck, and the Mayor put him in touch with plaintiff (Tr. 137). Plaintiff had known the truck for five or six years or more, and had driven it for some time about six months prior to the accident (Tr. 118-119). He and his father knew most about the truck and were most familiar with it of all the persons in Deer Lodge (Tr. 128). In fact, plaintiff completely describes all the alleged defective conditions of the truck from which he claims defendant should have forseen danger from explosion by centrifugal force (Tr. 118-119; 128). Plaintiff drove the truck three or three and one-half days before the accident, (Tr. 122) doing his work regularly and satisfactorily, but at no time did he make any complaint or give any information to defendant about the claimed defective conditions (Tr. 152). Plaintiff alleges in his complaint that he was a skilled mechanic (Tr. 38; 50), and admits in his reply that he was an experienced truck driver (Tr. 73). Thus

it appears that in addition to Schurman's inspection, defendant procured a skilled mechanic and experienced truck driver who was more familiar with the particular truck than any other person in the country except his own father. If that was not exercise of reasonable care by defendant we cannot conceive of the precautionary extent to which the mythical ordinary prudent man would go. These facts are entirely undisputed, coming mainly from plaintiff himself. We submit that they require a ruling as a matter of law that defendant exercised reasonable care.

Finally, to foreclose any possible doubt about the question of reasonable care, we point out that there is absolutely no evidence whatever in the record that the danger of centrifugal force could have been discovered by any degree of care. If a skilled mechanic like plaintiff, thoroughly familiar with the truck, could not foresee any danger of this kind, then certainly defendant cannot be charged with negligence in failing to foresee it. We have already pointed out that plaintiff's witness Stubbs gave no testimony concerning a low speed truck motor and a heavy aluminum fan. Therefore, without repeating that discussion, we may say that there is no evidence that the conditions plaintiff described should charge any one with notice of danger from centrifugal force. If the defect existed it was latent and hidden. Proof of its discoverability is the *sine qua non* of plaintiff's case. Yet it is utterly lacking here. While plaintiff mentions crystallization of the fan in his complaint, this idea was apparently abandoned by him at the trial. At any rate, there is no proof with respect to it.

We therefore submit that plaintiff has failed to show any breach of duty by defendant, even if we assume that the fan really did explode by centrifugal force. If it did, it was simply a fortuitous and unexpected event, arising out of a latent and hidden defect, for which defendant may not be held responsible in damages. For this further reason, the defendant's motion for directed verdict should have been granted, and the case must now be reversed and dismissed.

The general rule that a master is not liable for a latent or hidden defect, not discoverable by ordinary care, will not be questioned by counsel. It is stated well in 39 C. J. 435:

> "The master is not liable for injuries resulting to a servant by reason of latent defects of which he was ignorant and which could not be discovered in the exercise of reasonable care and diligence."

The cases most closely in point are several involving exploded emery wheels. An emery wheel of course cannot be compared to a cast aluminum fan, either in composition or use, but the principle of the cases is the same.

The first case is,—

> Bardsley vs. Howard & Bullough Mch. Co., 176 Fed. 619.

The plaintiff alleged that the emery wheel was dangerous, improper, unsafe and liable to burst, because it was run without flanges attached to the side thereof. He proved that there were flanges on the wheel but that they were about half as large as they should have been. The court reversed a judgment for the plaintiff, holding that the variance between no flanges and small flanges was

immaterial but that plaintiff failed because there was no evidence as to what caused the wheel to burst.

The second is:

Rodell vs. Adams (Penn.) 80 A. H. 253,

The plaintiff was a skilled workman with twenty years experience, and selected the emery wheel from stock and placed it on the machine. He claimed that the spindle was too light for the wheel and caused it to vibrate, making the grinding of tools more difficult, but not rendering it unsafe. Plaintiff told defendant of the vibration, but did not state that it was dangerous. The court affirmed a judgment of nonsuit, holding that if plaintiff, a skilled workman, did not consider that the wheel was dangerous, his employer had no reason to believe it so.

The third is:

Saxe vs. Walworth Mfg. Co. (Mass.) 77 N. E. 883.

There an emery wheel being used 10 feet from plaintiff's work, burst and a piece struck him in the head. The wheel was nearly new, and had never been guarded, although a guard might have been used and would have prevented the piece from hitting plaintiff. The court affirmed a verdict directed for defendant, holding that there was no evidence that if the wheel was defective the defect could have been discovered by the exercise of ordinary, or even the highest diligence, and that as the wheel was not guarded when plaintiff was first employed, defendant was not obliged to guard it thereafter.

See, also, Simpson v. Pittsburg Locomotive Works, (Pa.) 21 A. & I. 386.

There are other cases analogous in principle. In,

Great Northern Ry. vs. Johnson, (CCA 8) 207 Fed. 521,

plaintiff was injured by a piece of metal breaking off from a flue upon which he was working. He showed that some of the flues were old, thin, and others crystallized. It also appeared that none of the men had ever known of a piece breaking out in this manner before. The court reversed a judgment for the plaintiff, and held:

> "Considering that the flue upon which Johnson was working was old and brittle, was there evidence of negligence upon the part of the railway company which would warrant the jury in finding a verdict against it? The fact that Johnson was injured as alleged, as between him and the railway company, is no evidence of negligence on the part of the company. Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361. The question then comes to this: How could the railway company have obtained, by the exercise of ordinary care, any knowledge that the flue from which the piece broke off was dangerous to work upon? Johnson, a boiler maker, did not know it, nor did the seven other witnesses know it. Must the ordinary care required of the railway company be such as to compel it to investigate and ascertain that which experts in a particular business do not know, and never heard of, especially in view of the fact that whether or not a flue would throw off pieces of itself could not be determined in advance of the actual attempt to install it in the flue sheet, and in view of the further fact that, of all the flues that had been so expanded, eight witnesses, including Johnson, had never heard of such an occurrence?"

A Montana case is very closely in point. In,

> Forquer vs. Slater Brick Co. 37 Mont. 426; 97 Pac. 843,

plaintiff claimed that a nozzle of the hose attached to the clay mixing machine was defective so that suddenly the full force of the water issued from the nozzle and

threw plaintiff's hands into the knives of the mixing machine. The court reversed a judgment for the plaintiff, and said:

> "No amount of testing would have apprized the defendant that such an accident as this was likely to happen. Indeed, as is suggested by defendant's counsel, a perusal of the plaintiff's narrative of how it did occur is sufficient to convince us that the defendant could not possibly have apprehended the happening of an event which seems to have taken place in opposition to elementary physical laws * * * Moreover, if recovery is sought because of a defective nozzle, there is no testimony as to how the accident actually occurred. There is no causal connection between the injury to plaintiff and any condition of the hose or nozzle. No jury could say what it was about the hose or nozzle that caused the accident. In this regard the case falls squarely within the rule laid down by this court (Cases cited). There must be some substantive testimony to justify a jury in returning a verdict for the plaintiff in such cases."

In,

> Canadian Northern Ry. vs. Senske, (CCA 8) 201 Fed. 637,

plaintiff was injured by a defective handhold on a foreign car. The exterior of the handhold disclosed no defect whatever, and a reasonable inspection would not have discovered the defect. The court held that there was no negligence upon which a recovery might be predicated.

Without detailing the facts in the following cases, we will simply refer to the citations for the Court's convenience.

> Mulligan vs. Montana Union Ry. 19 Mont. 135, 47 Pac. 795.

(Explosion of defective boiler; no liability).

Shankweiler v. B. & O. Ry. (CCA 6) 148 Fed. 195.

(Latent defect in brake rod; no liability).

Killman v. Palmer & Son Co., (CCA 2) 102 Fed. 224.

(Old crack in eye bolt; no liability).

Burbridge v. Utah L. & T. Co. (Utah) 211 Pac. 691,

(Defect in street car brakes; no liability).

Westinghouse Elec. Co. v. Heimlich, (CCA 6) 127 Fed. 92.

(Crystalized iron chain; no liability).

Lutgen vs. Stan. Oil, 287 S. W. 885 (Mo.)

(Latent defect in truck; no liability).

We submit that the foregoing demonstrates clearly that plaintiff has failed to prove negligence on defendant's part, even if we accept his theory of the accident. For this further reason, then, the court should have granted defendant's motion for a directed verdict, and the case should be reversed and dismissed.

III. PLAINTIFF ASSUMED RISK AS A MATTER OF LAW. As an affirmative defense defendant pleaded assumption of risk by plaintiff, and included this plea as one of the grounds of its motion for directed verdict (Tr. 234). It is peculiarly appropriate to this case, and rounds out our defense against plaintiff's claim.

The court will recall that plaintiff claims to be "well trained as a skilled mechanic," and also an experienced truck driver (Tr. 38; 50; 73); he further claims to have known more about the truck than any person in Deer Lodge but his father (Tr. 128). He described in detail all of its alleged defects and conditions. In other words,

he knew personally all of the facts which he contends charged defendant with knowledge of the danger from centrifugal force. Knowing the facts, the only thing lacking was appreciation of the danger, and this he of course denied (Tr. 119). He had to deny it, or he would have had no case.

The general rule on this subject is stated in,

39 C. J. 736:

> "In order to charge the servant with assumption of risks by reason of knowledge thereof, actual knowledge is not indispensable, but it is sufficient that the defects and dangers were so open and obvious that he should have known of the risks. Under these circumstances, the servant is presumed to have notice of the risks, and the law charges him with notice of the risks, whether he was actually aware of them or not, on the theory that one knows what it is one's duty to know, and he will not be permitted to say that he did not appreciate the danger."

Now, bearing in mind that plaintiff is a skilled mechanic and experienced truck driver, and also that he may not shut his eyes but must apply his training and skill as a reasonable man in going about his work, how can he consistently claim that defendant should have known and appreciated a danger which he himself should not have known and appreciated equally as well? Is defendant to be held to some higher degree of care than that exercised by a reasonably prudent skilled mechanic and experienced truck driver, already possessing full knowledge of the condition of the truck?

The case at this point presents a dilemma—if defendant should have known and appreciated the danger so as to be guilty of negligence, so should plaintiff, and he thereupon assumed the risk of what he did; on the other

hand, if plaintiff is not chargeable with knowledge of the danger, neither is defendant, and defendant was not guilty of the negligence charged. We can see no way by which plaintiff may avoid the full operation of one or the other of the above alternatives.

A perfect illustration of this is the case of,

Holland v. Pence Automobile Co., 72 Mont. 500, 234 Pac. 284.

There an expert mechanic was held to have assumed the risk of driving an automobile with a defective accelerator, the court assuming for the purpose of the decision that the automobile was defective and defendant negligent.

Plaintiff runs afoul of another equally well established rule of law, which is as follows:

39 C. J. 780.

"The rule that a servant has the right to rely upon the performance by his master of the duties imposed on him by law for the protection of his servants, is qualified by the further rule that, where a servant knows, or is charged with knowledge of defects and dangers in prosecuting the master's work, and continues in the master's employment voluntarily and without complaint, and without any promise that the defect will be remedied or the danger removed, he assumes the risk of any injuries which may result from such defect. The qualification above stated as operative in the case of knowledge actual or constructive on the part of the servant applies, notwithstanding the negligence and breach of duty of the master."

See also,

Russell v. Missouri Pac. R. R., (Mo.) 295 S. W. 102, certiorari denied 275 U. S. 571, 72 L. Ed. 421.

The moment plaintiff accepted employment as driver of the truck, he knew the conditions and dangers he faced better than any one else in Deer Lodge. Despite this, he worked for three or three and one-half days without notice or complaint to defendant. If ever there was a case made to order to fit the above rule, we submit that this is such a case. Common honesty and fairness require a servant to advise his master of defective machinery with which he is working, so as to give the master at least a chance to repair the defect before being mulcted in damages.

We quote another general rule affecting plaintiff's claim, from 39 C. J. 769:

> "The general rule is that, where the servant accepts or continues in employment, knowing or having equal means of knowledge with the master of the defects and dangers inherent in the employment, he assumes the risk of injury therefrom, even though the work might have been made safer by the master, the reason being that, under the circumstances, master and servant stand upon a footing of equality. For even stronger reasons, the servant accepts the risk where, from the nature of the employment and his duty in connection therewith, he has better knowledge or means of knowledge of the dangers of the employment than the master himself has."

The rule has been applied to cases of defective machinery, and if accepted by the Court at all, should be controlling.

Southern Turpentine Co. v. Douglass, 61 Fla. 424, 54 S. 385;

Wheeler v. Chicago, etc. R. Co., 267 Ill. 306, 108 NE 330; (Aff. 182 Ill. A. 194).

Roloff v. Luer Bros. Packing, etc. Co., 180 Ill. A. 127. (Aff. 263 Ill. 152, 104 NE 1093).

Mika v. Passaic Print Works, 76 N. J. L. 561, 70 A. 327.

Without briefing the cases in detail we will simply make reference to decisions which we deem closely analogous to the situation here presented.

Zeilmann vs. McCullough, 63 Atl. 368.

(Truck driver receiving injury from breaking of a pin; risk assumed).

Blair vs. Kinema Theatre, 272 Pac. 398.

(Plaintiff adjusting sign near ventilating fan climbing up protection bars; risk assumed).

C. N. O. & T. P. Ry. vs. York, 194 S. W. 1034.

(Experienced engineer in charge of stationary engine starting same by putting hand through spokes of fly wheel; risk assumed).

Ennis v. Maharajah, 49 Fed. 111.

(Unguarded cog wheel 3″ away from winch. Newer machinery guarded; risk assumed).

Detroit Crude-Oil Co. v. Grable, (CCA 6), 94 Fed. 73.

(Vibrating fly-wheel with projecting poles ½″ from water pipe catching on pipe and flying off. Risk assumed although precise occurrence not anticipated).

Wilkinson v. Tacoma Taxi Co. (Wash.), 293 Pac. 455.

(Car dangerous to crank because of defective timer; risk assumed).

SEE ALSO:

Stevens vs. Henningsen, 53 Mont. 306, 163 Pac. 470.
Paredia vs. Railroad, 123 Atl. 227.
Kalivas vs. Northern Pac. 165 Pac. 96.
Patterson vs. Railroad, 105 S. E. 746.

Concluding our argument on this point we submit that as a skilled mechanic plaintiff must be held to have known at least as much of the defective fan and danger of explosion as defendant; that he clearly continued to drive the truck in employment without notice or complaint to defendant; and that he was without doubt a servant who had knowledge of the current condition of the truck superior to defendant because it was in his sole, exclusive use, by reason of all of which plaintiff must be held as a matter of law to have assumed the risk of whatever injury he suffered. Therefore, the Court should have granted defendant's motion for directed verdict, and the case should be reversed and dismissed.

SECTION TWO.

IN ANY EVENT DEFENDANT SHOULD HAVE A NEW TRIAL.

Thus far we have set forth our several contentions for a reversal and dismissal of the case. If the court should hold that plaintiff was entitled to go to the jury, there still remain for consideration several serious errors which prejudiced defendant's rights at the trial. The court certainly realizes that defendant has made a strong showing, in any event, and that the case is so close defendant might well obtain a verdict in its favor if the jury were fairly instructed on the law and the evidence fairly commented upon. Therefore any considerable deviation from the proper course of trial must have been seriously prejudicial to defendant's case. We will now set out several instances of prejudicial error committed by the Court at defendant's expense.

I. ERROR IN DEFINITION OF PROXIMATE CAUSE AND FORSEEABILITY. Plaintiff alleged that the fan became jammed, obstructed and broke (Tr. 37; 49). That was the cause of his injury, he says, and is what he alleges defendant negligently failed to repair and inspect (Tr. 34; 47). By his witness Stubbs he sought to prove that the condition of the fan charged defendant with knowledge of the danger from centrifugal force (Tr. 112-117). As we have pointed out, however, he was unsuccessful in this. Now, plaintiff having voluntarily predicated his case upon this theory, with allegations and evidence to bear it out, defendant asked the Court to give the instructions contained in Specification 15 (Tr. 292) to the effect that defendant was not liable unless it could reasonably have foreseen that the fan would explode as plaintiff contended. The Court refused this and defendant duly excepted (Tr. 236). Thereupon the Court instructed the jury as set forth in Specification 25, (Tr. 297) to the effect that all plaintiff had to prove was that defendant should have foreseen some injury to someone using the truck, without any confining limitations at all. To this the defendant excepted (Tr. 273) without avail.

This was clearly prejudicial error of a most serious kind. Evidence of the general run-down condition of the truck was admitted "merely on the question of notice" (Tr. 100), and then over defendant's objection. Plaintiff did not even attempt to connect anything about the truck to his theory of the accident except the matters counsel included in his question to Stubbs (Tr. 112), i. e., wobbling, humming fan with worn bearings. Now for the

Court to take down all bars and tell the jury that if defendant might have foreseen injury to someone from attempting to crank the truck, or attempting to stop it, or steer it, or raise the dump body, or fill it with water, or any one of a hundred other things that one might do with an old truck and get hurt, it was liable for the consequence of centrifugal force even though no one could have discovered the danger thereof, is going entirely too far. The Court had no right to go clear beyond the limits within which plaintiff himself chose to try his case. Plaintiff is legally bound by the acts of negligence he alleges.

West vs. Wilson, 90 Mont. 522; 4 Pac. (2d) 469.

How can we now say whether the jury simply thought the truck was too old to use safely, and defendant might have anticipated some injury from some part of it and was therefore liable, or whether it actually found in favor of plaintiff's contention that danger of centrifugal force should have been foreseen? This instruction poses the crucial question in the case, so far as the jury is concerned. If defendant's liability is broadened clear beyond plaintiff's complaint and theory, as well as the evidence, how could it have had even a reasonably fair trial? There is no doubt about the rule of law that,—

> "Under general rules instructions must conform and be confined to the issues raised by the pleadings and evidence. * * * The right of recovery should be confined to the specific cause of action alleged in the declaration."
>
> 39 C. J. 1220, par. 1402.

This is the law in Montana.

St. John vs. Taintor, 56 Mont. 204, 182 Pac. 129.

It is also the law in the Federal Courts.

Arnall Mills vs. Smallwood (CCA 5) 68 Fed. (2d) 57

Denver Tramway vs. Anderson, (CCA 10) 54 Fed. (2d) 214

Grand Morgan Theatre vs. Kearney (CCA 8) 40 Fed. (2d) 235.

Therefore we submit that defendant's Instruction six, in Specification 15 (Tr. 292), should have been given by the Court, and defendant's exception to the Court's charge in Specification 25 (Tr. 297) should have been sustained. The jury was not correctly advised as to the law on foreseeability and proximate cause, to defendant's distinct prejudice and over its direct exception.

It should be borne clearly in mind that the question here is *not* whether under proper pleadings and proof defendant could be held liable simply for having furnished plaintiff an old truck. Rather, it is the distinctly different question of whether under the limited and particularized pleadings and proof found in this record, defendant may be held so liable.

II. ERROR IN ALLOWING DAMAGES FOR IMPAIRMENT OF EARNING CAPACITY. Defendant requested the Court to charge the jury that plaintiff had made no proof of loss of earning capacity (Tr. 239, Specification 24, Tr. 297), but the Court refused to do so (Tr. 236). Instead the Court instructed the jury that it might allow damages for loss of earning capacity, basing figures on expectancy of life and annuity costs (Tr. 257). When defendant excepted to this portion of the charge, the Court made a long and unjustifiable statement to counsel and the jury which in effect told them positively

that there was ample proof of damage in this respect (Tr. 301). Defendant in turn excepted to this statement (Tr. 302). The Court also told the jury that plaintiff's expectancy of life was 40 years, though there was no evidence to that effect, and attempted to justify the statement on the ground that Mr. Murphy of defendant's counsel had agreed to it (Tr. 300). It was finally agreed that the statement had been objected to as not applicable to this case, in the light of the evidence (Tr. 301). All of this is claimed as error in Specification 26 (Tr. 299).

No one will deny that before a plaintiff may claim damage for impairment to earning capacity, he must first produce evidence of the nature and extent of the impairment. Let us see what plaintiff produced. There is no dispute, of course, as to the extent of his injury, or that he had been a mechanic at times in the past. However, plaintiff did not prove:

1. How long he had been employed as a mechanic.
2. When he ceased to be so employed.
3. Why he ceased to be so employed.
4. What earnings he received as such.
5. Whether he sought employment at any place other than Gerrish Motors.
6. Whether he attempted to obtain any other kind of employment.
7. What he might earn at employment he could perform.
8. Whether his injury affected his skill as a truck driver, or prevented his performance of any kind of work except that of a mechanic.

9. Whether he had earned so much as a dime either before or after the accident.
10. What his expectancy of life was.
11. The cost of any annuity in a responsible life insurance company. (Tr. 121).

Despite this lack of proof, the court stated the following things not in the evidence:

1. Plaintiff earned $6.00 or $7.00 a day prior to the accident.
2. Plaintiff earned $5.25 or $5.50 a day at the time of the accident.
3. He could not obtain employment anywhere as a mechanic. (Tr. 301).

If anything could me more highly prejudicial and unwarranted than submitting the issue of loss of earning capacity to the jury upon such evidence, and then stating facts not in evidence to sustain it, at the close of all argument to the jury on both sides, we do not know what it could be. And a verdict of $3500.00 for an amputated fourth finger shows better than argument the inflaming effect it had on the minds of the jurors.

On the law applicable to this point of evidence necessary to warrant damages for loss of earning capacity, we cannot do better than to quote from Robinson vs. Woolworth Co., 80 Mont. 431, 261 Pac. 253. It was a personal injury case, plaintiff claiming permanent injuries disabling her from teaching school again. Defendant there asked just such an instruction as we asked in Specification 24, and for refusal to give it the Supreme Court reversed a judgment for plaintiff. The exact par-

allel between that case and the instant case is shown by the words of the court there:

> "Counsel for defendant urge as error the refusal of the court to give defendant's offered instruction No. B-13, as follows: 'You are instructed, in this case, that, the plaintiff having failed to produce any evidence in relation to the difference between her earning capacity prior to the accident and her earning capacity now, you cannot consider her loss of earning capacity in reaching a verdict in this case.'
>
> An instruction to that effect was given in Montague v. Hanson, supra. In the opinion in that case, this court clearly drew a distinction between a person's earning capacity and his ability to pursue his usual vocation. The opinion says: 'One of the elements to be taken into consideration was the disability to pursue his usual vocation. This element does not include compensation for loss of earning capacity. In a given case, the plaintiff's earning capacity may be so small as to be a negligible element in making up the estimate, yet the destruction of his capacity to pursue his established course of life is nevertheless a deprivation for which he is entitled to compensation.' One may prefer to earn a livelihood at his chosen vocation. The satisfaction is worth something. If wrongfully deprived of it, he is entitled to damages for such deprivation. Yet, his earning power may not be diminished; he may be able to earn as much at something else. In that event, while entitled to some damages for being deprived of the satisfaction of following his chosen vocation, he would not be entitled to any damages for diminished earning capacity. In this case, one physician gave testimony tending to show that plaintiff was disabled for teaching, because it would require her to be on her feet a great deal, but no medical or other witness testified how much plaintiff's earning capacity was diminished or that it was diminished at all. Plaintiff testified to pain and suffering and said she was not able to teach school but

> said nothing as to how much her earning capacity was diminished, if at all. In fact, the jury was left in the dark as to what was her earning capacity at the time of the trial but she must have had some, for she had been following occupations other than teaching. Inasmuch as plaintiff claimed permanent injury and disability, diminished earning capacity may be a serious factor but there is no evidence about it. We hold it was prejudicial error to refuse to give offered instruction No. B-13 and the error was accentuated by the giving of instruction No. 20-A-8, which expressly told the jury, if it should find for plaintiff and should find her injury or injuries to be permanent, it might take into consideration impairment of her capacity to earn money in future; this, in spite of the fact that there was no evidence of impairment of earning capacity in general or at anything other than teaching."

Therefore, we submit that prejudicial error was committed first when the court submitted the consideration of loss of earning capacity to the jury at all, and second, when the Court went so far outside the record in commenting and instructing the jury on the point.

III. ERROR IN REFUSING INSTRUCTION ON SCOPE OF PLAINTIFF'S EMPLOYMENT. Defendant requested the court to charge that if plaintiff went outside the scope of his employment in attempting to repair the truck, defendant was not liable (Tr. 238, Inst. 9). This the court refused (Tr. 236). This is specified as error in Specification 18 (Tr. 294).

The general rule on this point is stated in 39 C. J. 803, as follows:

> "Where a servant voluntarily and of his own motion exposes himself to risks outside of the scope of his regular employment, without or against the order of the master or vice principal, and is injured thereby, the master is not liable."

In his complaint plaintiff alleges that he was employed to "*drive*" the truck (Tr. 28; 40). He testified:

"I was employed to drive a truck." (Tr. 117).

When he was injured he was not driving the truck but was repairing it, a distinctly different duty which he alleges defendant should have performed. Since he was employed as the driver, not a mechanic, he should have reported the defect to his foreman for repair. When a man is employed to do a certain job, his employer is not required to guard against the man's doing other and different duties. That is common sense.

So, here, defendant was not obliged to guard against what might happen to plaintiff except as to dangers reasonably arising from the driving of the truck, and not from the repairing of the truck. This conclusion is supported by all the decided cases.

In,

Sevanin v. Milwaukee Railroad, 62 Mont. 546, 205 Pac. 825,

an employee without instruction or authority from anyone placed a locomotive underneath an overhead air pipe which had become frozen, procured a torch, climbed upon the engine to thaw the pipe and touched the torch against the electric trolley wire so that he was electrocuted. The court held that the evidence of negligence was insufficient but that in any event plaintiff was acting without instructions and outside the scope of his employment. Therefore a judgment of nonsuit was affirmed.

In,

Therriault v. England, 43 Mont. 376, 116 Pac. 581,

plaintiff was employed to load clay pigeons into the traps

at a shooting club, which was in a small shed. He was looking through the cracks at the gunners, and was shot in the eye. The court reversed a judgment for plaintiff, holding that at the time of his injury he was acting outside the scope of his employment and not in the discharge of his duty.

In,

Kansas City Southern Ry. v. Self, (Okla.) 218 Pac. 833,

the plaintiff was told by his foreman to shut off the steam pipe in the boiler room, but instead of that he tampered with a valve at a joint in the pipe, receiving injury from escaping steam. There was no definite proof that the valve with which he tampered was defective, but there was no doubt about the escape of steam. The court reversed a judgment for plaintiff, holding that he had gone outside the scope of his employment and had violated his instructions.

The following are cases holding that where it is not the duty of the servant to repair the machinery with which he works, he acts outside the scope of his employment and assumes the risk of injury if he attempts to repair the machinery without orders from his employer.

Mellor v. Merchants Mfg. Co. (Mass.) 23 N. E. 100.

McCue v. National Starch Mfg. Co. (N. Y.) 36 N. E. 809.

International Ry. Co. v. Hall (Tex.) 102 S. W. 740.

Therefore we submit that in the light of plaintiff's own pleadings and testimony, defendant was at least entitled to have that defense submitted to the jury for

consideration, and that prejudicial error was committed when the court denied defendant's request for a charge to that effect.

IV. ERROR IN NOT INSTRUCTING ON PHYSICAL FACTS AND LAWS. By Instruction 15, defendant requested the court to charge that the jury should disregard testimony in conflict with physical facts or the law of nature (Tr. 239). This the court refused entirely (Tr. 236), and the subject was not mentioned in his charge. This point is raised by Specification 23. (Tr. 296).

We have already cited cases clearly establishing the correctness of the instruction as a legal principle. There is no reason whatever why it should not have been given, and it seems to us that there can be few cases where such a cautionary instruction is more appropriate. Most of the evidence in the case is made up of physical facts and laws of nature. Where the defense rest primarily on their controlling weight and significance, surely such a charge is fair and reasonable. How could the jury otherwise know that it had the legal right and duty to disregard plaintiff's oral testimony in favor of superior physical facts and laws? And as we said before, where the question is so close, as it is here, any charge not giving full effect to the claims of the parties has prejudicial effect and deprives them of a fair and impartial trial.

V. ERROR IN REJECTING PRESUMPTION THAT FAN WAS NOT DEFECTIVE. By Instruction 5, defendant requested the court to charge the jury that it is presumed that defendant did not furnish a defective

truck, or that if it did, it was not negligently ignorant of the defect (Tr. 237; Spec. 14, Tr. 291).

This is clearly the law, as shown by two Montana decisions in master and servant cases. In,

> Makarites vs. Milwaukee R. R., 59 Mont. 493, 197 Pac. 743,

it is held:

> "In Thompson on Negligence (second edition), section 3864, we find the following: 'In an action by an employee against his employer for injuries sustained by the former in the course of his employment from defective appliances, the presumption is that the appliances were not defective, and, when it is shown that they were, then there is a further presumption that the employer had no notice or knowledge of this act, and was not negligently ignorant thereof.' The defendant is entitled to the advantage of the presumption that he had performed his duty, until the contrary appears. (Forquer v. Slater Brick Co., 37 Mont. 426, 97 Pac. 843; Boyd v. Blumenthal & Co., 3 Penne. (Del.) 564, 52 Atl. 330.)"

There is no reason why this instruction should not have been given. The subject was not otherwise covered in the charge. On a question so close as defendant's constructive knowledge of the danger from centrifugal force, certainly defendant was entitled to the benefit of the presumption if the law gives it.

CONCLUSION.

While we believe other errors were committed against defendant at the trial, they are not as serious as those which we have argued, and we do not urge them upon the court.

We are in earnest in requesting the court to reverse and dismiss this case. We are frank to say that

in many years of practice we have never found as weak a plaintiff's case ripening into judgment in his favor. Here he has utterly failed to prove by legal evidence how his accident happened—this by virtue of the rules against evidence contrary to physical facts and laws, against a case resting on speculation and conjecture, and against a case built up by inference drawn from inference. Going further, he has similarly failed to prove proximate negligence of defendant by showing that ordinary care would have disclosed the danger of explosion from centrifugal force. Going further yet, he has failed to excuse himself from knowledge and appreciation of the danger at least equal to that of defendant, and must be said to have assumed the risk of this occurrence as much as defendant should have guarded against it.

If the court is unwilling to reverse and dismiss the case, nevertheless we think defendant's right to a new trial cannot be denied. The lower court's errors in broadening the rule on proximate cause far beyond both pleading and proof, in instructing and commenting upon loss of earning capacity without a word of evidenc to justify such action, in denying our whole defense of plaintiff's deviation from employment into repair work, and in denying our requested instructions on physical facts and the presumption in our favor, could not have failed to prejudice defendant's cause. These errors are

the more crucial because of the demonstrated strength of defendant's proof, which on a fair trial might well result in a verdict in its favor.

Upon these grounds the cause is

Respectfully submitted.

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Service of the foregoing brief by receipt of true copy is hereby acknowledged this.....day of July, 1936.

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Attorneys for Appellee.